APPENDIX "A"

Opinion of Supreme Court for New York County (Lupiano, J.) on Renewed* Motion for Modification of Judgment in Stephen v. Zivnostenska Banka

SUPREME COURT
OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JOHN A. STEPHEN, formerly known as HANS AUGSTEIN, and OTTO AUGSTEIN, *Plaintiffs*,

—against—

ZIVNOSTENSKA BANKA, NATIONAL CORPORATION, also known as Zivnostenska Banka, National Corporation, formerly Zivnostenska Banka or Zivnostenska Bank, *Defendant*.

Defendant heretofore moved for an order modifying the restraining provisions contained in the judgment entered on August 6, 1956, and in previous orders of this court. That application was disposed of by a decision of this court, dated February 18, 1960. Thereafter, defendant moved to reargue but submitted new matter. The court, at a hearing held on June 21, 1960, and upon consent of the parties agreed to consider this motion as one to renew. It is so treated.

Plaintiff, a creditor of defendant, brought the action, pursuant to Section 977-b of the Civil Practice Act, for the appointment of a permanent receiver of the assets of defendant, within the State of New York. The complaint was predicated upon the ground that the defendant had been nationalized by decree of the Republic of Czechoslovakia, dated October 24, 1945. Judgment was granted in favor

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* This is the second opinion of the Supreme Court for New York County; the opinion on the original motion is in Zivnostenska Record, pp. 235-243.

of plaintiff on August 6, 1956, and the permanent receiver appointed thereunder.

The judgment in part provided as follows: "1. That the plaintiff, Otto Augstein, have judgment against the defendant, Zivnostenska Banka, National Corporation, also known as Zivnostenska Bank, National Corporation, formerly Zivnostenska Banka or Zivnostenska Bank, for the relief demanded in the complaint herein, to the extent warranted by the provisions of section 977-b of the Civil Practice Act. 2. That the defendant, Zivnostenska Banka, National Corporation, pursuant to decree No. 102 of the Republic of Czechoslovakia, its Law No. 31 of 1950 and Proclamation No. 383 of its Ministry of Finance, was nationalized within the meaning and contemplation of section 977-b of the Civil Practice Act; has ceased to do business; no longer exists; and it has not the capacity or willingness to meet its obligations and responsibilities to its creditors and stockholders. 4. That said Receivers be, and they hereby are directed to take, receive and reduce to their possession, and to liquidate and reduce to cash, any and all assets, credits, choses in action and other property, tangible and intangible, within the State of New York of the defendant Zivnostenska Banka, National Corporation." The judgment further provided that the restraining provisions in the orders of May 3, May 12 and May 21, 1952, were continued in force and effect and injunction was extended to cash deposits and securities held by the financial institutions in the name of the Statni Banka:

The judgment was affirmed by the Court of Appeals (3 N. Y. 2d 862). Upon application of defendant the remittitur was amended by adding thereto the following: "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: Defendant argued that section 977-b of the New York Civil Practice Act and the appointment of a receiver pursuant thereto were in violation of estab-

lished principles of constitutional law and in conflict with the foreign policy of the United States. This court held that there was no such violation or conflict" (3 N. Y. 2d 931).

Defendant then appealed to the Supreme Court of the United States. The appeal was dismissed "for want of a substantial federal question" (356 U. S. 22).

The personal property sought to be released herein is held by various financial institutions in the name of defendant and the State Bank of Czechoslovakia (hereinafter called Statni Banka).

The previous application was based upon a suggestion of immunity, filed by the Department of State of the United States, through the offices of the United States Attorney for the Southern District of New York. The suggestion stated in part that the Secretary of State "accepts as true the statement of fact of the Czechoslovak Government that the listed cash and securities constitute the property of the State of Czechoslovakia and that consequently the United States Government recognizes and allows the claims of the Czechoslovak Government that such property in the United States is immune from execution or other action analogous to execution." The United States Government did not intervene as an interested party but presented the suggestion of immunity as a matter of comity between the Government of the United States and the Government of Czechoslovakia. The property involved is listed in Annexes 1 and 2, and the Czechoslovak Government claimed that the property listed in Annex 1 was acquired by it through the defendant and the property listed in Annex 2 was acquired by it through Statni Banka. The letter of June 22, 1959, from the State Department of the United States requests the United States Attorney "to present to the court the views of the Department and also to inform the court that the Department of State accepts as true the statement of fact of the Czechoslovak Government

in its note of June 16, 1959, above that the attached securities as listed in Annex 1 and 2 of that note constitute the property of the State of Czechoslovak."

On the return date of that application, opposing affidavits were submitted by certain third parties claiming ownership to some of the very property to which the Czechoslovak Government asserted immunity. Moreover, defendant had filed a proof of claim with the receiver on October 7, 1957, in which defendant stated that the "true owners" of certain of the property were persons other than Statni Banka. The ownership of such property is now asserted to be in the Czechoslovak Government.

Subsequently, an affidavit of an Assistant United States Attorney was filed with the court. Attached thereto was a photostatic copy of a letter dated December 19, 1959, written by the Assistant Legal Adviser of the State Department of the United States to the Chief, General Litigation Section of the Department of Justice. The pertinent part of that letter read as follows: "As Mr. Evan was advised on a recent visit to this office, the suggestion of immunity filed in the Zivnostenska Banka case by the United States Attorney at the instance of the Department of State was not intended to be a determination by the Department of any controversy between his client and the Government of Czechoslovakia as to the ownership of any securities involved in the case or to deprive his client of the opportunity of establishing ownership of any securities. *It follows that the Department had no intention of suggesting that any property not owned by the Government of Czechoslovakia was immune from execution or from proper disposition by the Court*" (Italics mine). This court then held that a judicial rather than a political question was presented, denied that application, but granted leave to the Government of Czechoslovakia to prove its claim of ownership (see Stephen v. Zivnostenska Banka, 23 Misc. 2d 855). The Czechoslovak Government did not avail itself of that op-

portunity but made the present application, which originally was one for reargument.

Submitted and received upon this application is new matter in the form of a photostatic copy of a letter dated May 12, 1960, written by the Legal Adviser of the Department of State of the United States to an Assistant Attorney-General of the United States. That letter, in part, states: "Inasmuch as it is our view that the Court's opinion in the Stephen case indicates a misunderstanding of the position of the Department of State with respect to the immunity from execution of property of the Czechoslovak State involved in this case, it is deemed necessary to clarify our position further. The Department's position is that it recognizes and allows the claim of the Czechoslovak Government that the securities listed in Annexes 1 and 2 of its note of June 16, 1959, constitute the property of the State of Czechoslovakia and that such property is immune from execution or other action analogous to execution. The Department's letter of December 15, 1959, referred to by the Court should be read in the light of the Department's previous letter of June 22, 1959, and of the particular situation to which it was addressed. The December letter meant only that if Mr. Gellert or any other claimant in the case could prove to the Court that specific property listed by the Czechoslovak Government in the Annexes to its note as property of the State actually belonged to him as a matter of Czechoslovak law rather than to the Czechoslovak State because, for instance, the particular law in question was not intended to apply to the property or because he had complied with the necessary legal requirements to recover the property, then the sovereign immunity of the Czechoslovak State did not extend to such property. It did not mean that the Czechoslovak Government could be required to prove in Court its ownership of property to which its claim had already been recognized and allowed by the Department of State."

The constitutionality of section 977-b of the Civil Practice Act is beyond dispute (Stephen v. Zivnostenska Banka, supra; Oliner v. Am. Oriental Banking Corp'n, 252 App. Div. 212, aff'd 277 N. Y. 588). The receiver has title to the property of defendant in the State of New York pursuant to section 977-b, subdivision 19, of the Civil Practice Act, subject, of course, to true ownership.

It may very well be that the Czechoslovak Government acquired title to the listed property through nationalization. This acquisition is again opposed in part by "true owners" and wholly by the receiver.

Nationalization decrees of foreign governments are repugnant to the public policy of the State of New York (Vladikavkazsky RR. v. N. Y. Trust Co., 263 N. Y. 369). These decrees are not given extra-territorial effect over assets which have their situs in the State of New York (U. S. v. President, &c., Man. Co. et al., 276 N. Y. 396, 977-b, subdiv. 19, of the Civil Practice Act).

The cases cited by the movant in support of its position are not apposite of the situation presented here. Moreover, no authority has been cited, nor has the court found any by its own independent research which precisely lends itself in the determination of the questions posed by this unusual set of circumstances. None involve the nationalization contemplated and interdicted by section 977-b of the Civil Practice Act. Moreover, a suggestion of immunity, such as submitted here, was not considered. Nor did title to the property vacillate and the extent of the immunity alter itself as is here demonstrated. It is to be noted the photostatic copy of the letter dated May 12, 1960, still permits "Mr. Gellert or any other claimant" to prove to the court that the specific property listed in the annexes actually belonged to them. It prescribes the method of such proof and states that such ownership must be proved under Czechoslovak law. But, from the papers submitted, the

movant seeks to have the immunity apply absolutely only to the receiver.

There are presently claimants in addition to Mr. Gellert who assert "true ownership." Whatever such ownership may be, sovereign immunity should not depend, as the State Department strives to make it do in these circumstances, on the nature of the parties against whom the privilege of immunity may be asserted, or on the nature of the claims made by those parties. It seems that the State Department may not recognize and allow the claim of the Czechoslovak Government to be the owner of the property listed in the annexes and yet allow only certain parties to prove ownership to that very property. Such responsibility of distinction should not be given to the State Department.

The suggestion of immunity presented is unique and extraordinary and greatly unlike any involved in the cases cited by the movant which treat and define the force and effect of an immunity made with clear purpose and intent of sealing off judicial action in a pending controversy. In those cases, the resultant effect is an instantaneous end of further judicial proceedings and the diversion of the whole matter, as a strict political question, into diplomatic channels. Here, the hybrid immunity does not seek nor bring about complete cessation of the judicial course but prescribes a method for judicial resolution entailing survival and continuance of the judicial proceedings in favor of one class of ownership without extending similar privilege to another class of ownership. And yet, even slight knowledge of the history of this extensive litigation, protracted over a period of eight years, will reveal that the unfavored ownership asserted by the receiver has been recognized and validated by the highest court of the State of New York and later was implicitly recognized by the highest court of our land.

The court realizes the gravity of recognizing any conclusive suggestion of immunity, but the extent to which the

court will weigh a suggestion depends upon the manner in which such immunity is suggested. It will be considered as conclusive only with respect to such statements as are within the exclusive responsibility of the executive branch of our government. However, where the suggestion makes for class distinction of ownership the court feels that the suggestion has gone beyond the pale of special competence of the executive branch. As here, its action devitalizes the suggestion as a political question since the suggestion, as finally presented, has been brought to rest on matters which, in their ultimate suggested state, require the court to retain and judicially determine them.

As further reason for such holding, one need only advert to the suggestion wherein a method of proof of ownership is imposed upon those parties who thereby are allowed to offer proof of their asserted ownership. Clearly, this phase of the suggestion is an intrusion upon the judicial function, and, moreover, is contrary to the applicable method of proof generally acceptable in our courts. Accordingly, the court is constrained to deny the motion. However, leave is granted to the Government of Czechoslovakia, if it be so advised, to appear before the referee heretofore appointed by order of the court dated July 1, 1958, who shall take proof of such ownership of the assets claimed by the Czechoslovak Government in the application and report to the court. All claimants who have appeared herein are likewise afforded such right. Settle order.

APPENDIX "B"

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
WASHINGTON 25, D. C.

Office of
the Chairman

October 10, 1962

Sigmund Timberg, Esq.
815 15th Street, N.W.
Washington 5, D. C.

Dear Mr. Timberg:

Pursuant to your request, I am pleased to furnish you with the following information concerning the total awards made by the Commission in the Czechoslovakian Program and the amount of funds available for the payment of such awards.

Information available to the Commission discloses that the net balance of the Czechoslovakian Claims Fund after deduction for administrative expenses was approximately $8,540,750.00. The aggregate amount of initial payments on awards certified by the Commission will be approximately $2,772,150.00, leaving a balance of approximately $5,768,600.00 for the payment of pro rata shares in accordance with the provisions of the governing statute. The total amount of all awards thus certified, including principal and interest, was $113,645,205.41.

Inasmuch as the paying agency, the Treasury Department, is now engaged in the task of effecting the first distribution of the Fund, the foregoing statistics should not be considered absolute. Further information concerning this matter may be obtained by communicating with the Secretary of the Treasury, care of Investment Branch, Washington 25, D. C.

Sincerely,

EDWARD D. RE
Chairman